Supreme Court, U.S.
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No. 98-878

IN THE
Supreme Court of the United States

October Term, 1998

CULT AWARENESS NETWORK,

Petitioner,

vs.

JASON SCOTT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED ON THE WRIT DO NOT REQUIRE DETERMINATION OF DISPUTED FACTS

Petitioner, Cult Awareness Network, Inc. ("CAN") submits this reply in support of its petition for writ of certiorari to address what appears to be the principal basis for respondent Scott's opposition brief. Namely, respondent seeks to characterize issues before the Court as ones requiring the determination of disputed facts. That characterization is not accurate. By so limiting this response, petitioner should not be deemed to accept any of the other arguments raised by respondent. As set forth in the petition for certiorari, petitioner respectfully requests that certiorari be granted on all three questions presented.

Behind the inflamed rhetoric, hyperbole and incessant recitation of facts irrelevant to the issues for which petitioners seek certiorari, lies a very simple straightforward fact pattern upon which respondent seeks to tie CAN to the illegal acts upon which liability is based. This simple fact pattern was set forth by the Ninth Circuit panel (Cert. Pet. A-8 - A-10) and is acknowledged by respondent once one

pierces through the irrelevancies of respondent's brief in opposition to certiorari. Petitioner accepts and acknowledges that the Ninth Circuit has accurately described the factual record in this case. That record is not, contrary to respondent's protestations, subject to dispute. Resolution of the issues for which petitioners seek certiorari will not require this Court to resolve a single factual dispute.

The questions presented in the petition address whether this undisputed fact pattern can form the basis for imposition of liability against an advocacy organization such as CAN consistent with the First Amendment or with the limitations on imposition of vicarious respondeat superior liability under 42 U.S.C. §1985. The Ninth Circuit's decision affirming the imposition of liability is not only inconsistent with this Court's prior decisions, but is also in the words of Judges Kozinski, Pregerson, Reinhardt, Kleinfeld, Hawkins, Tashima, and McKeown "a great leap backwards in First Amendment freedoms" with the potential

to silence the message of numerous advocacy organizations across the country. (Cert. Pet. B-1, B-8)

In summary, the factual record establishes that Shirley Landa referred Rick Ross, a deprogrammer, to Kathy Tonkin. Ross initially performed legal deprogrammings of Tonkin's minor children and then later performed the illegal deprogramming of Scott, Tonkin's eldest son. CAN's alleged liability is based on the following facts: Landa was a volunteer contact person for CAN for the state of Washington. Landa was a former Board member of CAN. CAN acted through its contact people. CAN did refer people to deprogrammers. A CAN national employee had referred other people to Ross, but believed Ross only performed involuntary **legal** deprogrammings. Ross solicited referrals from CAN and attended CAN conventions. CAN took no action with respect to Landa after the events at issue. That is it. There is no evidence of record that Tonkin was reaching out to CAN to seek a referral, that Landa believed or stated she was acting on behalf of CAN in making the referral to

Tonkin, that any CAN officer, director or employee was aware of, in fact authorized, or in fact ratified the referral of by Landa of Ross to Tonkin, or that any CAN officer, director or employee was aware of, in fact authorized, or in fact ratified the **illegal** deprogramming of Scott. Respondent does not and cannot assert facts to the contrary.[1]

In light of the factual record, petitioner's certiorari petition raises important questions regarding the application of *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982) and 42 U.S.C. § 1985 to efforts to impose liability on advocacy organizations. These questions are important as more

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[1] Perhaps recognizing the weakness of this factual scenario, respondent resorts to misrepresentation of facts in its brief in opposition. For example, respondent claims that Landa identified herself as a CAN representative to Tonkin. That evidence is nowhere in the record, is contrary to the testimony of both Tonkin and Landa and is not referenced by the Ninth Circuit. Second, respondent asserts that Paul Martin was a CAN Board member and co-conspirator at the time of the events in question. In fact, Mr. Martin was not a CAN Board member at the time of the events in question.

and more individuals and organizations seek to silence advocacy organizations through the imposition of crippling damage awards based on tenuous links between the illegal conduct at issue and the organization.

Accordingly, this case presents the opportunity for this Court to determine whether liability may be imposed on an organization that advocates, through policy or practice, controversial legal actions when a volunteer for the organization carries out that policy in an illegal way. Here, the evidence demonstrated that CAN had a policy of making referrals to deprogrammers who conduct involuntary deprogrammings. (Ninth Cir. Maj. Op., Cert. Pet. A-9, A-10) But not all involuntary deprogrammings are illegal. As the Ninth Circuit recognized, involuntary deprogrammings of minors are legal. *Id.* at A-9. The Ninth Circuit did not find, nor is there evidence, that CAN had a policy or practice of making referrals to deprogrammers who performed illegal involuntary deprogrammings. As Judge Kozinski noted: "There is a big difference between advocating an activity

when it is lawful and advocating the same activity when it is unlawful." (Cert. Pet. B-6) For example, an anti-abortion group may well have a policy encouraging picketing of abortion clinics. But such picketing can be carried out in a legal or an illegal fashion. Liability should not be imposed against the organization simply because one of its volunteers on a specific occasion pickets by way of an illegal trespass into the abortion clinic unless the organization had knowledge of or ratified the illegal picketing activity at issue. Liability should not be imposed on organizations such as CAN unless there is a "finding that [CAN] authorized . . . or ratified unlawful conduct. . . . " *NAACP v. Claiborne Hardware*, 458 at 930-31.

The case also presents the opportunity to determine whether, under *NAACP v. Claiborne Hardware*, *supra*, and 42 U.S.C. § 1985, the fact that liability is being imposed against a non-profit advocacy organization based on the acts of a part-time volunteer, rather than a paid employee, requires an enhanced evidentiary burden for imposing

vicarious agency liability. As *Amicus Curiae,* American Family Foundation, et al., point out there is a significant legal difference between the acts of a servant/employee and the acts of a volunteer. The servant/employee by the nature of the relationship is subject to the right of control by the employer over the details of his physical conduct. *See*, Brief *Amicus Curiae*, at pp. 11-12; W. Page Keeton, *et al.*, Prosser and Keeton on the Law of Torts, §69 (5th Ed. 1984). Imposing vicarious tort liability for the illegal acts of the servant/employee is justifiable because of the presumption of control and benefit by and to the employer for acts committed by the employee during the course of the employment relationship. These presumptions do not apply in the context of a volunteer working on behalf of a non-profit organization. To the contrary, application of a presumption against agency, as urged by *Amicus Curie*, Brief at pp. 13-14, makes sense and is consistent with the heightened standards for imposing liability against advocacy organizations under the First Amendment.

The point here is not, as respondent suggests, to relieve non-profit organizations per se from vicarious liability. Rather, the point is that a heightened burden of evidence linking the non-profit advocacy organization to the illegal acts of its volunteer members is required before vicarious liability can be imposed. That heightened burden cannot be sustained here based on the facts of record.

Respectfully submitted,

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